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In re Application of
Shirley et al.
Application No. 09/187,661
Filed: 5 November, 1998
Attorney Docket No. 5784-3

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: DECISION DISMISSING PETITION
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This is a decision on the petition filed 8 January, 1999, requesting that the above-identified application be accorded a filing date of 6 November, 1998, instead of the presently accorded filing date of 5 November, 1998. The petition is properly treated as a petition under 37 CFR 1.10(d).¹

Petitioner alleges that the application was deposited in Express Mail service on 6 November, 1998, and that the United States Postal Service (USPS) made an incorrect "date-in" entry. In support of the petition, petitioner submitted, *inter alia*, (a) a copy of Express Mail receipt No. EM166858928US (the same Express Mail number found on the transmittal letter filed with the original application papers

¹Effective 1 December, 1997, paragraph (d) of 37 CFR 1.10 states that::

Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Commissioner to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS, provided that:

- (1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;
- (2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and
- (3) The petition includes a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS. Any statement submitted in support of such a showing pursuant to this paragraph must be a verified statement if made by a person other than an employee of the USPS or a practitioner as defined in § 10.1(r) of this chapter.

located in the official file) showing a "date-in" of 5 November, 1998; (b) a copy of the transmittal letter showing the practitioner's docket number, the Express Mail receipt number listed above, and a Date of Deposit of 6 November, 1998, and (c) a copy of the post card receipt showing the practitioner's docket number, a date of 6 November, 1998, and a U.S. Patent and Trademark Office date stamp of 5 November, 1998. It is noted that the transmittal letter, reference (b) above, contains a certificate of mailing from Rebecca Allen stating that it was deposited in "Express Mail Post Office to Addressee" on 6 November, 1998.

The instant petition lacks the showing required by 37 CFR 1.10(d)(3). Petitioner has not made an adequate showing that the requested filing date is the date the correspondence was deposited in the Express Mail service. Petitioner has submitted no evidence from the USPS which would corroborate petitioner's assertion, that is, the "date-in" was incorrectly entered by the USPS. If fact, the evidence submitted supports the USPTO's position that the application was in fact deposited on 5 November, 1998. Furthermore, petitioner's reliance on the certificate of mailing is not well taken because a certificate of mailing is no longer required under 37 CFR 1.10. At best, the certificate of mailing serves as evidence of petitioner's original intent to deposit the application in Express Mail on 6 November, 1998, not as evidence of the actual deposit of the application in Express Mail.

The petition is dismissed. The petition fee will not be refunded.

Any request for reconsideration (no further petition fee is required) must be filed within TWO MONTHS of the date of this decision in order to be considered timely [37 CFR 1.181(f)]. The request should be addressed as follows:

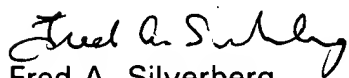
By mail: Assistant Commissioner for Patents
Box DAC
Washington, D.C. 20231

By FAX: (703) 308-6916
Attn: Special Program Law Office

By hand: Crystal Plaza 4
Room 3-C23
2201 South Clark Place
Arlington, VA 22202

The application is being forwarded to Technology Center 1600 with a filing date of 5 November, 1998, and for treatment in due course of the Response to Restriction Requirement filed 12 June, 1999, in reply to the restriction request mailed 6 June, 1999.

Telephone inquiries specific to this matter should be directed to Petitions Attorney Douglas I. Wood at (703) 308-6918.



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